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Brf. of Carlisle & Humphrey for Appellants

Supreme Court of the United States

Filed Mar. 11, 1901.

GERMAN NATIONAL BANK, ET AL., ... *Appellants,*

VERSUS

A. J. SPECKERT, ET AL., ... *Appellees.*

BRIEF FOR R. H. COURTNEY, RECEIVER OF THE GERMAN NATIONAL BANK.

JOHN G. CARLISLE,
WILLIAM M. SMITH,
ALEX. POPE HUMPHREY,
For Appellants.

JOHN P. MORTON & COMPANY, LOUISVILLE, KY.

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STATEMENT.

April 4, 1894, the appellees, A. J. Speckert and others, filed a suit in the Jefferson Circuit Court against the German National Bank and others. (R., 1.) This suit alleged that the defendants had entered into a conspiracy to induce the plaintiffs to subscribe to stock in the Louisville Deposit Bank, and had made certain false and fraudulent representations in reference thereto; that the Deposit Bank had become utterly insolvent, its assets having been diverted to pay certain debts due by one Moses Schwartz, a co-conspirator, to the German National Bank.

January 14, 1895, the answer of the German National Bank was filed to this suit. (R., 14.) After further responsive pleadings (R., 30–31), a stipulation was filed, December 5, 1896, agreeing that certain proof taken in another case in the same court, pending against the German National Bank, should be read in this case (R., 32).

December 21, 1896, certain co-defendants of the German National Bank in this case filed an answer and made it a cross-petition against the German National Bank and others, praying a judgment. No process seems to have been issued upon this cross-petition (R., 33).

In January, 1897, the German National Bank having stopped payment, the Comptroller of the Currency appointed R. H. Courtney Receiver.

June 28, 1897, Mr. Courtney filed an application in the State Court to be made a party to this suit. The Court entered the order prayed for (R., 39).

Mr. Courtney then filed a petition to remove the cause from the State Court to the Circuit Court of the United States for the District of Kentucky, accompanying it with the proper bond (R., 40).

The State Court entered an order filing the petition and bond and accepting the bond, and to the effect that the Court would proceed no further therein (R., 39).

October 4, 1897, upon the filing of this transcript in the Circuit Court of the United States for the District of Kentucky, the plaintiffs moved to remand the same (R., 1).

February 8, 1898, the Court overruled this motion, filing a written opinion (R., 42). 85 F. R. 16.

February 28, 1898, time was given to the complainant to reform the bill of complaint. Such a reformed bill was filed April 14, 1898 (R., 50).

June 6, 1898, the German National Bank and Courtney, as Receiver of the Bank, filed a demurrer to this reformed bill (R., 58).

October 3, 1898 (misprinted October 31), this demurrer was sustained, the Court delivering a written opinion (R., 59).

October 15, 1898, the plaintiffs having declined to plead further, the bill was dismissed (R., 65).

From this final decree the plaintiffs duly had an appeal allowed to the Circuit Court of Appeals (R., 65). The case was heard in that Court. The mandate of that Court was that the Circuit Court should remand the cause (R., 70), 98 F. R. 152, to the State Court. Thereupon an appeal was taken to this Court, assigning these errors (R., 74).

Assignment of Errors.

1. The Court erred in reversing the judgment of the United States Circuit Court for the District of Kentucky.

2. The Court erred in holding that the Circuit Court should have remanded this cause to the State Court.

3. The Court erred in holding that the Circuit Court did not, by the removal, obtain full and complete jurisdiction of this cause.

4. The Court erred in failing to hold that the action of the Circuit Court in sustaining the demurrer to the bill and dismissing the case was correct.

Two questions are presented: First, should the Circuit Court of the United States have maintained jurisdiction of the cause? Second, should the demurrer to the bill as reformed have been sustained? We will consider these questions in their order:

Jurisdiction of the Court.

From the foregoing statement it will appear that certain persons, alleging the existence of a large claim against a national bank, brought suit to recover the same in the State Court of the residence of the plaintiffs and of the inhabitancy of the bank. Pending this suit, and after issue joined, and some proof taken, the bank having become insolvent, the Comptroller appointed a Receiver. This Receiver interposed, and, having obtained an

order of the State Court making him a party defendant, removed the case to the United States Circuit Court. Was this removal proper?

Under Section 5234 of the Revised Statutes, whenever the Comptroller of the Currency is satisfied that a national banking association is in default, as provided in Section 5226 and Section 5227, it is his duty to appoint a Receiver.

> "Such Receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts; and on a like order, may sell all real and personal property of such association on such terms as the Court may direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the shareholders."

By Section 5236 of the Revised Statutes it is provided:

> "From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such Receiver on all such claims as may have been approved to his satisfaction or adjudicated in a court of competent jurisdiction."

The exact status of the case at bar is this:

This National bank, having failed, and all of its assets having been put into the hands of a Receiver, under the laws of the United States, and this Receiver, finding a suit pending against the bank in the State Court, believed that the claim asserted was not a just one. Proof of the claim was made to the Comptroller and he rejected it. (R., 56.)

Under these circumstances, it is obvious that the bank could not continue to defend this suit. It was without means or credit.

The Receiver, therefore, must undertake the defense; but how undertake it? Was he bound to do so in the name of the bank, remaining in the State Court, or was it competent for him to have himself made a party defendant and remove the cause to the Federal Court? In other words, as the claim must be adjudicated in a court of competent jurisdiction, did the Receiver have the right to insist upon the Federal tribunal as the court of competent jurisdiction to adjudicate this particular claim?

Jurisdiction in Suits by and Against National Banks.

Originally, there was jurisdiction in suits by and against National Banks in the Federal Courts. This was because the statute gave such jurisdiction, and also because National banks, being corporations created by Federal law, every suit by or against them involved a controversy arising under the laws of the United States.

The 59th section of the Act of February 25, 1863, provided that all suits *by* and *against* such associations might be brought in the proper courts of the United States or State. (Kennedy v. Gibson, 8 Wall. 506.)

The Act of June, 1864, printed in Petri v. Commercial Bank, 142 United States, 645, provided that suits, actions and proceedings *against* any association under this act may be had in any Circuit, District, or Territorial Court of the United States held in the district in which such association may be established.

In Kennedy v. Gibson, 8 Wall. 506, this Court notes that the word "by" is here dropped. It holds, however, that the omission was doubtless accidental, and that suits might be brought *by* or *against* the association in the courts of the United States.

So in the Revised Statutes, Section 563, it was provided that the Circuit Court should have original jurisdiction of all suits by or against any banking association established in the district for which the court is held, under any law providing for National banking associations.

Congress, however, determined to cut down this jurisdiction, and by the Act of July 12, 1882 (20 Statutes, 162; Chapter 290), it was provided as follows:

> "That the jurisdiction for suits hereafter brought by or against any association established under any law providing for National banking associations, except suits between them and the United States, or its officers and agents, shall be the same as and not other than the jurisdiction for suits by or against banks not organized under any law of the United States, which do, or might do, banking business where such National banking associations may be doing business when such suits may be begun."

The following was inserted as Section 4 in the Act of March 3, 1887, re-enacted August 13, 1888 (25 Statutes, 433; Chapter 866):

> "All National banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the Circuit and District Courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State."

In Leather Manufacturers' Bank v. Cooper, 120 U. S. 779, this Court had occasion to consider the above Act of 1882, limiting the jurisdiction of suits by and against National banks, as to the Federal Courts, and there held that it was the purpose of that statute to prohibit the assertion of such jurisdiction by removal as well as by original cognizance.

In Whitemore v. Amoskeag Bank, 134 U. S. 528, it was decided that, under the Act of 1882, a bill could not be filed against a National bank in a Federal Court where there was no diversity of citizenship between the complainants and the defendants, and the bank was located in the State of which all the other parties were citizens. In other words, the case is a simple application of the Act of 1882.

In Petri v. Commercial National Bank, 142 U. S. 644, this Court discusses, by the Chief Justice, the various statutes on the subject of the jurisdiction of the Federal Court in suits by and against National banks, including the limiting Acts of 1882 and 1888. The Court held that the jurisdiction of the Circuit Courts of the United States over suits by and against National banks was originally derived, first, from the express provisions of the statutes giving such jurisdiction; second, from the principle of law, well settled, that as a National bank was a corporation created by Congress, every suit by and against it necessarily involved a controversy arising under the laws of the United States. This express statutory jurisdiction had been taken away and the jurisdiction had thereby been also taken away, so far as it arose simply from the fact that the National bank, being a Federal organization, necessarily constituted every suit by or against it a Federal controversy. The Court held, however, that a National bank had the same right to bring a suit in the Federal Court that any citizen had, and therefore a National bank could invoke the jurisdiction of the Federal Court where there was diversity of citizenship or where there was a controversy arising under the Constitution and laws of the United States; we mean one other than the controversy which necessarily arose from the fact that the corporation was one of Federal creation.

The point absolutely decided, however, was that the National bank, being a resident of one State, could bring a suit against a citizen of another State.

In Ex-parte Jones, 164 U. S. 692, these authorities were reviewed and the statutes again considered, and it was held that as the suit was by a citizen of Pennsylvania against a defendant (a National bank) having its place at Boston, the jurisdiction of the Court was on account of diverse citizenship, and that there could be no appeal from a Circuit Court of Appeals to this Court, upon the ground that a Federal question was involved, merely because the bank was a Federal corporation.

These authorities show the status of the law as to Federal jurisdiction of actions by and against National banks at this time.

The Circuit Court for the Sixth Circuit, composed of Mr. Justice Harlan and Circuit Judges Taft and Lurton, has recently entertained suits by National banks located in Kentucky against a municipal corporation of Kentucky, where the complainants alleged that they had contracts for a commutation of taxation, which the State was endeavoring to impair, and where it was alleged that a taxing law was in violation of the Federal Banking Act. First National Bank v. Stone, 88 Fed. Rep. 409; Third National Bank v. Stone, 88 Fed. Rep. 990. These cases came here and were reversed on the merits, no question being made by the Court as to jurisdiction. 174 U. S. 438.

Jurisdiction by and Against Receivers of National Banks.

Having said so much in reference to suits by and against National banks, it remains to consider the jurisdiction in suits by and against Receivers of National banks.

In Kennedy v. Gibson, 8 Wall. 503, a Receiver of a National bank filed a bill in equity in a Federal Court, to enforce the double liability of the stockholders. The jurisdiction of the case was challenged because there was no sufficient diversity of citizenship. The Court held that the Receiver represented both the creditors and the association; that he was the proper party to institute all suits; that they might be brought both at law and in equity in his name, or in the name of the association for his use, and that when he sued in his own name it was not necessary to make either creditors or the association parties.

Adverting to the 59th section of the Act of February 25, 1863, providing that all suits and proceedings arising out of the provisions of this act, in which the United States or its officers or agents shall be parties, shall be conducted by the District Attorneys of the several districts, under the direction and supervision of the Solicitor of the Treasury, the Court held that, considering this section in connection with the succeeding section, the implication was clear that the Receivers might sue in the Courts of the United States by virtue of the act, without reference to the locality of their personal citizenship.

This being true as to a suit by the Receiver, the same reasons would sustain the jurisdiction in suits against the Receiver.

In the case of Bank of Bethel v. Pahquioque Bank, 14 Wall. 384, this Court had under review the decision of the Supreme Court of Connecticut. The Bethel Bank failed. The other bank brought suit against it in the State Court of Connecticut, upon a claim that had been rejected by the Comptroller. There was judgment for the Bethel Bank. This was affirmed by the Supreme Court of Connecticut and then by this Court of the United States.

The case is interesting as showing that such a suit could be brought by the creditor in the State Court, and, notwithstanding

the bank had failed, it might be so brought against the failed bank without making the Receiver a party.

In Denton v. Baker, 79 Fed. Rep. 193, attention is called to the fact that, while the Receiver was not a party to the suit, the report of the case in the Supreme Court of Connecticut shows that the suit was there defended by the Receiver, by direction of the Comptroller of the Currency, in the name of the defendant to the suit, for the benefit of the stockholders and creditors of the bank. (36 Conn. 325.)

In Bank v. Kennedy, 17 Wall. 19, a Receiver of a National bank brought suit in the District of Columbia against a debtor of the bank. The Court said that a question had been made in the cause as to the right of the Receiver to bring suit without the authority of the Comptroller, and also it had been insisted that the action could not be maintained by the Receiver in his own name as such. After citing the Fiftieth Section of the National Bank Act, 13 Statutes at Large, 114, the Court said:

> "We have already decided in the case of this same Receiver that he may bring suit in his own name or use the name of the association. This disposes of the question as to the legal right of the Receiver to sue."

The Court further held that he might sue without any express instruction from the Comptroller.

In National Bank v. Colby, 21 Wall. 609, suit had been brought in a State Court in Alabama against a National bank. Attachment had been sued out and levied upon its property. Pending this suit, a Receiver was appointed. About two years after the suit had been brought the Receiver intervened (*vide* page 611). The State Court decided against the Receiver, and, this judgment having been affirmed by the Supreme Court of Alabama, the Receiver took a writ of error to the Supreme

Court of the United States. Among other things the Court said:

> "It is too late for counsel to question in this court the right of the Receiver to appear in a State court and move the discharge of the attachment and the abatement of the suit, or to contest the case at the trial. Whatever informality may have existed in the proceedings, it was waived by the silence of the parties. Objections in matters of form or to the modes of procedure in the court below can not be urged here for the first time. But, independently of this consideration, we are of opinion that it was a proper proceeding on the part of the Receiver to apply to the court below to discharge the attachment, on proof of the facts presented by him, and the production of his appointment, and the decree dissolving the association. Invested with the rights of the bank to the possession of the property by his appointment, it was his duty to take the necessary steps to remove the levy. That levy was void as against his claim to the property, and, in our judgment, it was error in the Court to refuse to discharge it on his application."

It is true that the Court also puts its decision upon another ground, viz., that there had been a decree absolutely dissolving the bank; that this had abated the case so far as the bank was concerned; and therefore the Receiver was the only person who could defend. (*Vide* pages 614, 615.) Nevertheless, the Court did here lay down, as an independent proposition, that it was the right and duty of the Receiver to intervene, in order to protect the assets.

In Bank of Bethel v. Pahquioque Bank, 14 Wallace, 384, the Court had said:

> "Suits and proceedings under the act, in which the United States or other officers or agents are parties, whether commenced before or after the appointment of a Receiver, are to be conducted by the District Attorney, under the direction of the Solicitor of the Treasury, and no doubt is entertained that the directors, from the time the Receiver is appointed, cease to have any power in respect to such matters, and that the control and supervision of the same are vested in the proper officers of the United States."

We quote this expression because it was in a case where the bank had not been dissolved.

In National Bank of the Commonwealth v. Mechanics' National Bank, 94 U. S. 437, it appeared that the Commonwealth Bank, being in default, the Comptroller of the Currency had appointed a Receiver. The principal of the debts of the bank was paid. The Mechanics' Bank brought suit against the Commonwealth Bank, in the Circuit Court of the United States for the Southern District of New York, for the interest upon these demands. The Court held the suit well brought. No question seems to have been made as to proper parties, although it does not appear that the Receiver was a party.

In Case v. Bank, 100 U. S. 446, the Citizens' Bank of Louisiana brought suit in the Circuit Court of the United States for the District of Louisiana, against Case, Receiver of the Crescent City National Bank, claiming a judgment on account of a certain liability of the Crescent City National Bank. As we read the case, the Receiver was the only party defendant. Judgment was rendered directing the Receiver to pay the claim or to certify it to the Comptroller, and this was affirmed.

In Denton v. Baker, 79 Fed. Rep. 193, this case is adverted to as showing that the suit could be maintained against the Receiver alone.

In the case of In re Checkwood, 165 U. S. 457, the Chief Justice, in delivering the opinion of the Court, uses this language:

> "As neither the bank's officers nor directors, nor the Receiver, nor the Comptroller, would, on demand, bring suit, Checkwood's suit on behalf of himself and other stockholders of the California National Bank of San Francisco, to recover judgment in the bank's favor for the alleged wrongful acts of the managing agents of the cor-

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poration, must be assumed, on this record, to have been properly instituted; and it is not contended that this was ever challenged by the Receiver or by Statler, claiming as his successor. The Receiver was made a party defendant thereto, but took no steps to remove the cause to the Federal Court, and, as is averred, assumed an attitude of hostility to the prosecution of the suits, and did nothing to aid in seeking judgment against the officers of the bank, whose alleged breach of trust, and liability therefor, was the sole foundation for the action. Nor is it questioned that the suit was rightly brought in the State Court. (Whittemore v. Amoskeag National Bank, 134 U. S. 527.) The Receiver was appointed by the Comptroller of the Currency January 14, 1889, and Checkwood commenced his suit July 19, 1890. The Receiver was not the officer of any court but the agent and officer of the United States, as ruled by Mr. Justice Gray on circuit, in Price v. Abbott, 17 Fed. Rep. 506, and by Mr. Justice Jackson, then Circuit Judge, in Armstrong v. Troutman, 36 Fed. Rep. 275."

We have given these extracts as recognizing two propositions: One, that the Receiver would have been entitled to remove the case from the State Court to the Federal Court; the other, that the Receiver is an agent and officer of the United States.

In Gibson v. Peters, 150 U. S. 344, this Court had under consideration the right of the District Attorney to receive fees on account of litigation in favor of the Receiver of a National bank. Section 380 of the Revised Statutes of the United States provides that all suits and proceedings arising out of the provisions of law governing National banking associations, in which the United States or any of its officers or agents are parties, shall be conducted by the District Attorneys of the several districts, under the direction and supervision of the Solicitor of the Treasury.

The court said (Mr. Justice Harlan delivering the opinion):

"The suit brought against McDonald (which was a suit brought by the Receiver of the failed bank) was one arising

> out of the provisions of the Act of Congress governing such associations, and the Receiver, in whose name it was instituted, was an officer and agent of the United States, within the meaning of the above section."

In Sonnentheil v. Moerlein Brewing Co., 172 U. S. 504, a suit was brought by a citizen of the State of Texas against a citizen of the State of Ohio and the marshal of the United States for the Eastern District of Texas. The case resulted in a judgment for the defendants in the Circuit Court of the United States for the Eastern District of Texas, and this judgment was affirmed by the Circuit Court of Appeals for that circuit. From this latter judgment a writ of error was prosecuted to this court, and a motion was made to dismiss. This court held that the suit against the marshal for trespass committed by him in his official character was one arising under the Constitution and laws of the United States, and said:

> "The joinder of another defendant, jurisdiction over whom was dependent upon diversity of citizenship, deprived the marshal of no right he otherwise would have possessed. Though there are two defendants the case was one, and that a case in which the jurisdiction was not dependent entirely upon the opposite parties to the suits being citizens of different States."

It was therefore held that this Court had jurisdiction.

Again, in Auten v. United States National Bank, 174 U. S. 126–140, it appeared that a suit was brought by a New York National Bank against an Arkansas National Bank, and the Receiver of the latter bank. The question was as to whether that case could come here on writ of error to the Circuit Court of Appeals. The Court said:

> "To sustain the motion to dismiss it is contended that the jurisdiction of the case depends on diversity of citizenship, and hence that the judgment of the Circuit Court of

Appeals is final. But one of the defendants (plaintiff in error) though a citizen of a different State from the plaintiff in the action (defendant in error), is also a receiver of a national bank, appointed by the Comptroller of the Currency, and is an officer of the United States, and an action against him is one arising under the laws of the United States.

"It is therefore held that the motion to dismiss the writ of error be overruled."

Thus far, the decisions of the Supreme Court of the United States. We shall now call attention to the decisions in the Federal Reporter.

In Price v. Abbott, 17 Fed. Rep. 506, decided June 22, 1883, it appeared that the plaintiff, a citizen of New Jersey, was the Receiver of the Pacific National Bank of Boston, and had brought suit against sundry citizens of Massachusetts, stockholders in the bank, to recover the assessment due by them, made necessary to pay the debts of the bank. The amount of the assessment sued for in one action was $2,000; in another, $300. The Court held that the Receiver was an agent and officer of the United States; that under Clause 3, Section 629, the Circuit Court of the United States had jurisdiction "of all suits at common law where the United States or any officer thereof, suing under authority of any acts of Congress, are plaintiffs," and therefore the plaintiff in this case could maintain the action.

The Court further held that the limiting act of July 12, 1882, Chapter 290, Section 4, taking away jurisdiction in the case of National banks, did not affect this suit.

In Hendee, Receiver, v. C. & P. R. R. Co., 26 Fed. Rep. 677, decided in 1886, it was held that a Receiver of an insolvent National bank could bring suit in the United States Circuit Court to enjoin the defendant, a citizen of the same State (as we read it) as the plaintiff was, from disposing of certain assets

which the Receiver claimed to belong to his trust. The Court said:

> "It is argued that the Receiver has no greater rights than the bank, and merely represents it, and that therefore the jurisdiction is the same, and not other than it would have been if the bank, while doing business, had brought suit. . . . The purpose of that act (1882) appears to be to put National banks, as such, in the same situation as State banks for the purpose of suing and being sued. No State bank or other bank, not a National bank, could be in the same situation in which this bank is. It is wholly in the hands of the orator, as a Receiver, for the purpose of having its affairs wound up, and is not doing any business whatever anywhere. It was brought into this condition by proceedings under the laws of the United States. The orator was appointed to his position as Receiver by an officer of the United States, and is himself an officer of the United States, and acts as such in bringing this suit."

Again the Court said:

> "A suit in behalf of a corporation created by act of Congress arises under the laws of the United States, although the cause of action itself is founded on the common law or other statutes. . . . The right of the orator to sue arises in the same manner. He can not proceed at all without invoking the aid of the laws of the United States. The Act of 1882 appears to take away the right of the bank as such, but not to affect the right of the orator as Receiver. He is the Receiver to collect the assets and pay over the money raised from them to the Treasurer of the United States, and subject to the order of the Comptroller, for distribution among the creditors. . . . The receivership is an entire thing, provided for, controlled and regulated by the laws of the United States, through the Comptroller and the Courts of the United States within the district."

In Armstrong v. Ettlesohn, 36 Fed. Rep. 209, decided in 1888, there was an action by Armstrong, Receiver of a National bank, against the defendant. The Court held that, even though the amount in controversy was less than $2,000, the Court

would have jurisdiction under Clause 3 of Section 629, which we have quoted above; that the plaintiff had received his appointment under the National Banking Laws from the Comptroller of the Currency, and was acting under such authority; so that, being an officer of the United States, he had a right to sue, without regard to his citizenship or the amount involved.

In Armstrong v. Troutman, 36 Fed. Rep. 275, a Receiver brought an action against certain debtors of the bank. Objection was made to the jurisdiction, upon the ground that the plaintiff was a citizen of the same State with the defendants, and that the amount claimed was insufficient to confer jurisdiction under the Act of March 3, 1887. The Court said that prior to the Act of March 3, 1887, this was not an open question, as, under the Act of March 3, 1875, Receivers of National banks, being officers of the United States, could maintain such actions without regard to citizenship of the parties or the amount involved in the suit. The Court—Judge (afterwards Mr. Justice) Jackson, delivering the opinion—said:

> "While by the fourth section of the Act of March 3, 1887, National banking associations are, for the purpose of all actions by or against them, real, personal or mixed, and in all suits in equity, to be deemed citizens of the States in which they are respectively located; and while the jurisdiction of the Federal Courts in suits by and against these associations is only such as they would have in cases between individual citizens, it is, however, expressly provided 'that the provisions of this section shall not be held to affect the jurisdiction of the Courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.' It seems clear that, under this provision, the jurisdiction of this Court is preserved in cases like the present, where the Receiver is engaged in winding up the affairs of a National banking association and invokes the aid of this Court in collecting the assets of the bank."

The Court thus construes the language "winding up the affairs of the bank," as any necessary process of such winding up; and it would seem to be hardly debatable that the contesting of an unjust claim is as much an incident to the winding up of the affairs of the bank as the getting in of an amount due the estate.

In McConnville v. Gilmour, 36 Fed. Rep. 277, Judge Hammond held, that an agent of the bank was within the spirit of the decision we have just quoted. The opinion is an excellent one, as showing the purpose of Congress where a bank has become insolvent, to see that its affairs are properly wound up for the benefit of everybody: First, the United States; second, its creditors; third, its stockholders.

In Stevens v. Bernays, 41 Fed. Rep. 401, decided in 1890, a Receiver of a failed bank brought suit to enforce a liability on thirty-five shares of stock. The Court held, that the jurisdiction of the Court had not been affected either by the Act of 1882 or the Act of 1888, because a Receiver appointed by the Comptroller of the Currency to wind up the affairs of an insolvent National bank is an officer of the United States.

This case is again reported on appeal under the same style, 44 Fed. Rep. 643, decided in 1890.

The Court was composed of Miller, Justice, and Caldwell, Judge. The Court (in speaking of the jurisdiction of the Federal Court as affected by the Act of 1888, and first quoting the proviso in that act) said:

> "The provision of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States, or by the direction of any officer thereof, or cases for winding up the affairs of any such bank. Now, this case falls within the provisions of that proviso in two or three respects. In the first place, it is a case for winding up the affairs of the bank. It is a suit directed by an officer of the United States and prosecuted by an officer of the United States. The Comptroller

is an officer of the United States. He appointed the Receiver, who is also an officer of the United States, and directed him to bring this suit."

In Grant v. Spokane National Bank, 47 Fed. Rep. 673, decided in 1891, there was a motion to remand a suit which had been brought against the Receiver of a National Bank in a State Court, and by him removed to the Circuit Court of the United States. The Court refused to remand, and said:

> "I hold that the bank is only a nominal party. The Receiver must defend, as he is the one who will be held accountable for any unlawful or unauthorized application or disposition of the money which the plaintiff is endeavoring to secure, and his defense must rest upon a just interpretation of the laws of the United States; for as he holds his office under National authority his conduct must be regulated by the National laws. From the premises, and upon principles supported by the highest authority, the conclusion necessarily follows that the suit is one of which a Circuit Court of the United States is invested with jurisdiction by the clause of the act giving jurisdiction of suits of a civil nature arising under the laws of the United States."

In Fisher v. Yoder, 53 Fed. Rep. 565, decided in 1892, it is simply held that the Receiver of a National bank is an officer of the United States, and, as such, entitled to bring suit to collect its assets in the Federal Court. This is again held in Short v. Hebbin, 75 Fed. Rep. 113.

In Hot Springs v. First National Bank, 61 Fed. Rep. 417, there was a suit by the Hot Springs School District against the First National Bank of Hot Springs and Alvin Fox, Receiver of said bank, in the State Court. It was removed to the Federal Court, upon the ground that it was a suit arising under the Constitution and laws of the United States. The Court refused to remand it, saying:

> "Whatever funds or property this Receiver has, he has received from this insolvent bank, and he holds them by

> virtue of the laws of the United States relative to the appointment and action of Receivers of such banks. His defense to this suit and to every suit brought against him as Receiver is based upon these laws of the United States, under which he holds his appointment, and in accordance with which he must discharge the trust devolved upon him."

In Linn County National Bank v. Crawford, 69 Fed. Rep. 532, Judge Bellinger, after reciting the provisions of the Act of March 3, 1887, said:

> "I am of opinion that it is immaterial whether the action is brought by the Receiver, in his own name as Receiver, or by him in the name of the bank. The thing material to the jurisdiction is the fact that the whole property of the bank has been vested, by direction of law, in the Receiver, and the bank's affairs as an insolvent corporation, are in the control of the Comptroller of the United States Treasury, and are being wound up under his direction."

In Hallam v. Tillinghast, 75 Fed. Rep. 849, suit was brought by Hallam against Tillinghast as Receiver of a National bank, and was removed to the Federal Court. The amount involved was $478.75. The Court said:

> "This case is one arising under the laws of the United States, and, if the amount involved were sufficient, it would be removable under the acts defining the jurisdiction of the Circuit Courts, approved March 3, 1875, and March 3, 1887."

The case of Denton v. Baker, 79 Fed. Rep. 192, in the Circuit Court of Appeals for the Ninth Circuit, is a very full discussion of the right of a Receiver, in case suit is brought against the bank or against himself, in regard to a debt alleged to be due by the bank. His right to intervene and be made a party and defend the cause is pointed out with great clearness. The case does not involve the question of how claims are established against insolvent banks, and fully considers that question. It seems to us to show, beyond controversy, that the action of the State Court, in

the case at bar, in admitting the Receiver to defend, was entirely proper.

In Citizens' State Bank of Noblesville v. Hawkins, 71 Fed. 369; Cooper Insurance Company v. Hawkins, 71 Fed. 372, both decided in 1896; the actions were brought in the United States Circuit Courts by Hawkins as Receiver of the Indianapolis National Bank, and all of them were finally decided by Circuit Courts of Appeal. The question of jurisdiction was not raised in either of them by the counsel or by the Court, although in one of them the defendant was a citizen of the same State as the Receiver and the bank he represented. In Merrell v. National Bank of Jacksonville, 75 Fed. 148, decided in 1896, the action was brought *against* the Receiver in the United States Circuit Court by a citizen of the same State as the Receiver and the bank he represented. No question was made as to the jurisdiction.

In Snohomish County v. Puget Sound Bank, 81 Fed. Rep. 518, the Court held that the agent of the bank had the right to remove the case brought against him and the bank into the Federal Court, upon the ground that for all proper purposes the suit was one to wind up the affairs of an insolvent National bank. In Guarantee Co. v. Hannay, 104 F. R. 370, the right of removal by an agent of the failed National bank is fully discussed and sustained, with a reference to all the leading cases.

We do not pretend to have given all the cases upon this interesting subject. We think, however, we have given enough to show that the jurisdiction is sustained either in suits by or against the Receiver, and that the limiting clause in the Acts of 1882 and 1887 in regard to the jurisdiction over National banks does not apply to suits by or against the Receivers of these banks.

It has been noted above that in the case of Leather Manufacturers' Bank v. Cooper, 120 U. S. 779, the Supreme Court, in considering the Act of 1882, limiting the jurisdiction of suits by or against National banks, held that such limitation was to apply to removal as well as to the original institution of the action. It would seem entirely reasonable to apply the converse of this rule, and hold that as Congress had retained the jurisdiction for the purpose of winding up the bank, and where the Receiver or agent is a party, the jurisdiction should apply by the process of removal as well as by original process.

That it does so apply is clear from the provisions of the second section of the Act of 1888, as corrected and amended, which expressly extends the right of removal to all cases "of which the Circuit Courts of the United States are given original jurisdiction by the preceding section." According to numerous decisions of the courts, Receivers of National banks are officers or agents of the United States, and as suits brought by and against them arise under the laws of the United States, the section referred to plainly confers the right of removal in all cases where the amount in controversy is sufficient to give jurisdiction.

The legislation of 1882 and the fourth section of the Act of 1887, afterwards incorporated into the Act of August 13, 1888, have no reference whatever to the jurisdiction of the United State Courts over suits brought by or against Receivers of insolvent National banks. The sole purpose of Congress, as clearly disclosed by the language of the acts, was to deprive the banks while *sui juris* of the right to prosecute actions in the United States Courts by original process, or to remove them from State Courts upon the mere ground that they were Federal corporations, and to place them, in this respect, upon the same footing as State corporations and private

citizens; but, as is shown by many of the decisions heretofore cited, if a Federal question is actually involved in the controversy, a National bank may still sue or be sued in the United States Courts; and may remove the case from the State Courts. The acts relate to the banks alone while doing business, and the jurisdiction of the courts over suits commenced by or against Receivers of insolvent banks after the Government has taken control of their assets, upon the grounds that these officers are the creatures of congressional legislation, and derive all their authority from the laws of the United States, has not been taken away or curtailed to any extent by the legislation referred to.

All such suits arise under the laws of the United States, and it was upon this ground alone that Congress possessed the constitutional authority to enact the statutes which now constitute the fourth clause of Section 553 and the third clause of Section 629 of the Revised Statutes. The courts of the United States have no common-law jurisdiction in either civil or criminal cases. Their jurisdiction is derived wholly from the Constitution and the laws of Congress enacted in pursuance of the Constitution, and it is clear that if suits by or against Receivers of National banks and other officers of the United States, are not suits arising under the laws of the United States, the judicial power of the Federal Government does not embrace them, and Congress had no constitutional authority to pass the statutes under which the courts have exercised unquestioned jurisdiction for more than three-quarters of a century. There is no clause in the Constitution from which it can be inferred that the judicial power extends to suits brought by or against officers of the United States, unless such suits arise under the laws of the United States. The first clause of Section 2, Article 3 of the Constitution, enumerates the classes of cases to which the judicial power

of the United States extends, and Congress possesses no power to extend it beyond the limits thus prescribed. By that clause it is declared that—

> "The judicial power shall extend to all cases, in law or in equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State, claiming lands under grants of different States; and between a State or the citizens thereof, and foreign States, citizens or subjects."

The only language employed here which could, upon any reasonable construction, be held to extend the judicial power to suits by or against officers of the United States, are the words "arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority." And it is quite clear, not only from the character of the suits, but upon authority as well, that they belong to one of the classes of cases thus described.

In Osborne v. Bank of the United States, 9 Wheat. 738, Chief Justice Marshall, in discussing the right of the bank to sue in the Circuit Court, said:

> "The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to make contracts of any description, to transact business of any description, to sue on these contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of the law, but all its actions and all its rights are dependent upon the same law. Can a being thus constituted have a case which does not arise literally as well as substantially under the law?"

Again, he said:

> "The clause giving the bank a right to sue in the Circuit Court of the United States stands on the same principle with the acts authorizing officers of the United States who sue in their own names to sue in the courts of the United States. The Postmaster-General, for example, can not sue under that part of the Constitution which gives jurisdiction to the Federal Courts in consequence of the character of the parties, nor is he authorized to sue by the judiciary act. He comes into the courts of the Union under the authority of an act of Congress, the constitutionality of which can only be sustained by the admission that his suit is a case arising under a law of the United States."

In view, therefore, of the authorities cited and the reasoning of the Courts in support of them, we submit—

(1.) That, under Sections 563 and 629 of the Revised Statutes, the United States District and Circuit Courts have concurrent jurisdiction of all suits at common law instituted by Receivers of insolvent National banks, without regard to the citizenship of the parties or the amount in controversy.

(2.) That under the first section of the Act of March 3, 1887, as amended and corrected, the United States Circuit Courts have jurisdiction, concurrent with the courts of the several States, of all suits of a civil nature, at law or in equity, brought by or against Receivers of failed National banks, without regard to the citizenship of the parties, when the matter in controversy exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

(3.) That when any suit at common law or in equity in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, is brought in a State Court against a Receiver of a failed National bank, the defendant may, at the proper time, remove the same for trial into the United States Circuit Court.

(4.) That the Receiver is not deprived of his right of removal by reason of the fact that there are other defendants who can not remove because as to them there exists no Federal question.

It is, however, objected that the Receiver coming voluntarily into a suit pending against the bank at the date of his appointment, is no more than a substitute for the bank, and as such, comes into the suit subject to all of the disabilities of the bank whose place he takes so far as the right of removal is concerned.

The cases cited to support this proposition do not seem to us to control it.

They are all cases in which the jurisdiction was dependent upon diverse citizenship, and the Courts held that the necessary facts to confer jurisdiction, either original or by removal, must have existed at the time the action was commenced, and must have been taken advantage of at the proper stage of the proceedings. When the jurisdiction has attached by reason of diverse citizenship it can not be lost by the fact that the parties subsequently became citizens of the same State, nor can jurisdiction be acquired, pending the suit, by the removal of one of the parties to a different State, or by the voluntary transfer of the cause of action to a citizen of a different State; but we are not aware of any case in which it has been held that when the cause of action arises under the Constitution or laws of the United States it may not be removed whenever that fact is made to appear by the plaintiff's pleadings, whether it be before or after answer.

In Cable v. Ellis, 110 U. S. 397, the right of removal was denied to a *lis pendens* purchaser. We think it sufficiently appears that the defendant, from whom the purchase was made, might have removed the case, but failed to do so.

In the case of Houston & Texas Railroad v. Sherley, 111 U. S. 358, Sherley, a citizen of Texas, sued a railroad company.

Pending the suit he became a citizen of New York, and filed an amended petition, bringing in other defendants. These other defendants attempted to remove. The Court held that these new defendants came in as mere succes-ors of the railroad company in title, and also that the case could not be removed because the diversity of citizenship had not existed at the commencement of the action.

In Jefferson v. Driver, 117 U. S. 273, the same principle was applied, and it was again held that a *pendente lite* purchaser against whom relief was asked only as an incident to the original controversy, could not remove; that by purchasing *pendente lite* he connected himself with the suit subject to the disabilities of the other parties in respect to removal at the time he came in.

In Thorn Wire Hedge Company v. Fuller, 122 U. S. 540, an action of trespass was brought against a sheriff, and subsequently the persons in whose interest he had levied the execution, which was alleged to be the trespass, intervened and became parties. The Court held that it was a joint cause for action against all of them, and that, as the sheriff could not remove, none of them could remove.

In the case of Jarboe v. Templar, 39 Fed. Rep. 213, it was held that the Court does not lose its jurisdiction because, by a transfer of interest subsequent to the bringing of the suit, it comes to be one where there is no diversity of citizenship.

The case of Burnam v. Bank, 53 Fed. Rep. 163, is explicable on the same ground that Hedge Company v. Fuller, 122 U. S. 535, is decided upon.

The case of Grand Trunk Railway v. Twitchell, 59 Fed. Rep. 728, seems to be another case of the substitution of an administrator.

The case of Old Wagon Works v. Benedict, 67 F. R. 4,

comes squarely within Hedge Company v. Fuller, 122 U. S. 535, and is cited in support of that decision.

We submit that the Receiver can not be considered as a *lis pendens* purchaser. He takes a right higher than the bank. That is, he takes against the bank and can set aside transactions which the bank could not set aside; can dispute claims, for instance, which the bank could not dispute. He holds in a right adverse to that of the directors and stockholders. All of the assets of the bank are taken out of the hands of the directors and stockholders by force of law and are put into his hands, it being his duty to reduce these assets to money and pay the money into the treasury of the United States. A *lis pendens* purchaser is one who voluntarily acquires an interest in a pending litigation, and who need not even be made a party, but comes into the litigation only by matter of grace of the Court.

But quite the contrary is true of such an officer as a Receiver of a National bank. He comes in pursuance of a duty imposed upon him by the laws of the United States, to protect the assets of the bank from unjust demands as well as to preserve them from unjust seizure.

It amounts to nothing to say that, because the bank failed to apply for a removal, therefore it is too late for the Receiver to ask a removal. The bank never had any right to apply for a removal, but surely a Receiver can not be deprived of his right to remove because the bank did not remove, when it had no right to do so. This is punishing the Receiver for a negligence which never existed.

It is again objected, however, that the application of the Receiver was too late, because it was not made at the time when answer was due; but surely it was not to be expected that the Receiver could remove until he was appointed and had become a party to the cause.

In Powers v. C. & O. R'y, 169 United States, 93, this court, affirming a judgment entered by the Circuit Court (Judge Taft sitting, 65 Fed. Rep. 129), held that if the petition for removal was filed at the first moment when it could be granted, this was sufficient, even though the time had passed in which the defendant could have answered.

That was a case where a citizen of Kentucky sued a citizen of Kentucky and a citizen of Virginia, but just before going to trial dismissed his suit as to the citizen of Kentucky. It was accordingly held that the suit being in a condition to be removed when the citizen of Kentucky was dismissed out of it, an application for removal at that time was not too late.

The Court said:

> "Undoubtedly when the case, as stated in the plaintiff's declaration, is a removable one, the defendant should file his petition for removal at or before the time when he is required by the law or practice of the State to make any defense whatever in its courts, but it by no means follows, when the case does not become in its nature a removable one until after the time mentioned in the act has expired, that it can not be removed at all."

Again, the Court said:

> "The reasonable construction of the act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to the time must, when necessary to carry out the purposes of the statute, yield to the principal enactment as to the right; and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the Court in which it was brought."

In the case of Mecke v. Valley Town Mineral Company, 89 Fed. 209, the Roessler & Hesslacher Chemical Company was

made a defendant in the plaintiff's original pleading, but no judgment was asked against it. During the first term, and before the time for answering the original complaint had expired, the plaintiff applied for leave to amend, and was allowed thirty days to file the amendment, and defendants were allowed sixty days to answer. When the amendment was filed it prayed for a judgment against the chemical company for a large amount, and that company, before the sixty days expired, applied for a removal to the United States Circuit Court, which was granted. A motion to remand was made on the ground that the application was not in time, but it was overruled.

We think it must now be accepted as a sound rule of practice, under the Removal Act, that the application is in time if it is made as soon as the facts constituting a ground for removal properly appear in the case, even though the time for appearing and answering, as the case previously stood, has expired. Suppose a suit is instituted in a State Court, but it does not appear in the original complaint that it arose under the Constitution or laws of the State; or that a suit is brought in such a court by a citizen of one State against a citizen of another State, but the amount claimed in the original complaint is less than $2,000, and after answers have been filed an amendment is presented by the plaintiff which shows that the case does arise under the Constitution or laws of the United States, or which increases the amount claimed to a sum exceeding $2,000, could the defendant be deprived of the right to remove, upon the ground that he had already answered, and was, therefore, too late? The case of Guarantee Co. v. Hannay, 104 F. R. 370 (C. C. A., Eighth Cir.), seems to be exactly in point. We can see no difference between such cases and the case where a new and proper party is brought into the case after the original parties have answered. If there was no right of removal until his introduction

in the case, and he makes his application within the proper time after he is brought in, we do not see how it can be denied, except in cases where the jurisdiction depends upon diverse citizenship and the new party is a *pendente lite* purchaser, or otherwise succeeds one who could not have removed the case on that ground.

Wherever a national bank has become insolvent and suits are pending against it, the Receiver should, if he believes the claims are unjust, intervene and have himself made a party defendant. As is said in Earle v. Penn Bank, 178 U. S. 455, when the "bank suspended and went into the hands of a Receiver the entire control and administration of its assets were committed to the Receiver and the Comptroller." It belongs to the Court in which the suit is pending to determine, in the first instance, as to whether a Receiver can rightfully intervene and become a party. In the case at bar, the learned judge of the State Court, after argument, held that the Receiver had the right to intervene and become a party. Having thus become a party, it seems to us that no right which he has of removal can be at all affected by the failure of the bank to apply for a removal when, in fact, it had no such right, and that whether it had or not, as the Receiver is rightfully in the cause, he has, dating from the time he comes into it, all the rights which he would have if he had been originally made a party; and that a right can not be said to have expired before it has arisen.

It is objected again that there was here no right of removal, upon the ground that the suit involved a controversy under the laws of the United States, because the complaint did not show on its face that there was such controversy; and many authorities are cited to sustain that proposition. It is sufficient, however, to answer that even if the complaint did not itself disclose a cause of action arising under the Constitution and laws of the United States, under

the principles of Texas Pacific Railway Co. v. Cody, 166 United States, 606, this case would still be removable. It is held there most distinctly that where a suit is against a corporation created under the laws of the United States, even if the complaint allege that the corporation was organized under the laws of a State, and thus no Federal question appear on the face of the complaint, yet, in the application for removal the true status of the corporation can be stated, and in this way it can be shown that there is a Federal question involved.

But in the present case the original petition filed in the State Court clearly showed that there was a Federal question involved, which would have given the right of removal even before the Receiver was made a party, had it not been for the Acts of 1882 and 1887. Every suit brought by or against a corporation created or organized under an Act of Congress arises under the laws of the United States. This proposition is too well settled to require argument; but the effect of the Acts of 1882 and 1887 was to provide that, notwithstanding the cases arose under the laws of the United States, National banks could not sue or be sued in the Federal Courts, and could not remove suits upon that ground alone; that is, upon the sole ground that it was such a corporation. In other words, their effect was to provide that a particular class of corporations could not sue or be sued in the Courts of the United States, or remove causes to those Courts, although the cases arose under the laws of the United States. A discrimination was made against them in this respect, but against nobody else. The Statutes had no other effect, and, consequently, when a Receiver is brought into such a suit his position and his rights are precisely the same as they were before the laws were enacted.

But if the Federal question did not appear at the beginning of the proceedings it was disclosed the moment the Receiver was

made a party, and his right to remove, upon the record as it then stood, could not be denied.

Though no such point is made in the opinion of the Circuit Court of Appeals, it may be urged here that the removal was not proper because only the Receiver applied for it. The answer to this, however, is that only he could apply for it. The bank could not, and, indeed, the bank, after the intervention of the Receiver, became a mere nominal party. No Federal question was involved as to the individual defendants. The case of Mitchell v. Smale, 140 U. S. 406, is exactly in point, as is the case of Southern Pac. Co. v. Townsend, 62 F. R. 161. The case of Chicago Railway Co. v. Martin, 178 U. S. 245, may be cited. But that case itself points out the distinction between itself and Mitchell v. Smale, and does not attempt to overthrow the authority of the former case. A decision which has stood as long as Mitchell v. Smale, and controlled the practice for so many years, will not be overruled at this late day. Indeed, the case of Chicago Railway Co. v. Martin might well have been put on the ground since taken in the case of Gableman v. Peoria R. Co., 179 U. S., that it was not removable in any event.

In the cases cited against us, there is one which is undoubtedly against our contention. It is that of Wichita National Bank v. Smith, decided by the Circuit Court of Appeals for the Eighth Circuit, 1896, 72 Fed. Rep. 568. That was a case brought by Smith against the Wichita National Bank, in a State Court. Pending the suit the bank became insolvent, and one Ewing was appointed Receiver. Ewing applied to the State Court to be made a defendant, and his motion being sustained, he thereupon removed the case into the Circuit Court of the United States. A motion was made in the Circuit Court to remand the case, which was overruled. There being a trial and a judgment in favor of the plaintiff, the Receiver sued out a wit of error. The

Circuit Court of Appeals reversed the judgment and remanded the case. The Court held that the bank could not remove the suit, because it was not a non-resident. Therefore the suit was not removable on the ground of diverse citizenship. It then held that the bank could not remove the case upon the ground that there was a controversy arising under the laws of the United States growing out of the fact that it was a Federal corporation; and this being so, neither could the receiver remove, being a substituted party. We have heretofore criticised the cases holding this.

As for the last ground for remanding the case, that the plaintiff did not show that the suit was one arising under the laws of the United States, as we have heretofore shown, this is not tenable since the decision of Texas Pacific R. R. v. Cody, 166 U. S. 606.

We think, therefore, that the Circuit Judge correctly refused to follow this case, and that he rightly decided that, as the State Court had admitted the Receiver as a co-defendant, it then and there became the right of the Receiver to remove this case to the Circuit Court of the United States.

Argument Upon the Demurrer.

As stated above, the Circuit Court of the United States, having denied the motion to remand, a reformed bill was filed, to which a demurrer was sustained. To determine whether this action of the Court, in sustaining the demurrer, was rightful, the allegations of the reformed bill will have to be carefully examined. Its sufficiency has been argued as if it were a suit brought by a stockholder in the right of the corporation, the corporation possessing such right of action having made a general assignment for the benefit of its creditors, and the assignee refusing, upon application, to bring the suit. Judge Barr makes a careful ex-

amination of the reformed bill, and shows that such is not its character; but, to the contrary, it is a suit by a number of stockholders, each of whom alleges that, by fraudulent representations he was induced to subscribe to stock in the Louisville Deposit Bank, the amount subscribed and paid by each complainant stockholder being stated in the bill, and the claim being made on their part that the money thus paid by them upon their subscription to the stock of the Louisville Deposit Bank had been diverted from that bank into the coffers of the German National Bank, and insisting that the complainants have the right to follow this money and to recover it for themselves.

The opinion of Judge Barr is found R. 59, and it seems to us to be conclusive upon this question. We think, therefore, that the authorities cited, showing that when a corporation makes an assignment for the benefit of its creditors, the stockholders of such a corporation can, upon the refusal of the assignee to prosecute a corporate right of action, themselves prosecute such corporate right of action, are [illegible]mane to the present controversy. The reason for this is that there is no such bill here presented.

We submit that the demurrer should have been sustained upon the following grounds:

1st. That the bill stated no cause of action, legal or equitable.

2d. That if any cause of action was stated, the remedy was at law; and

3d. That the claims sued upon were held by separate and distinct parties, who can not unite in the same action, either at law or in equity.

I.

The German National Bank, even by the most formal corporate action, could not have legally incurred any obligation or liability, by contract or by representations, concerning the mat-

ters set forth in the bill. They were wholly foreign to the objects and purposes for which the association was created, and every one who dealt with it, or accepted representations made by it, or purporting to be made on its behalf, was bound to know that its authority did not extend to such subjects. The National Act (R. S., Sec. 5136) provides that "the Bank may exercise, by its board of directors, or duly authorized officers or agents, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes, according to the provisions of this statute."

Getting "control" of the charter for a State bank, or organizing a State bank, or soliciting subscriptions to the capital stock of such a bank, or any other corporation, does not come within the scope of the powers conferred by law upon National banking associations; and they can not, even by the most solemn contracts or the most positive statements or representations, oral or written, bind their stockholders and injure their creditors by attempting to engage in such transactions. They can not deal in lands, or stocks, or shares of other corporations, or even in commercial paper, except in the manner and for the purposes authorized by the statutes; nor can they act as brokers, or promoters, nor enter into any contract or incur any liability concerning business outside the objects of their creation.

National Bank v. Exchange Bank, 92 U. S. 122.
Western National Bank v. Armstrong, 132 U. S. 346.
Danforth v. Bank, 48 Fed. 271.
California Bank v. Kennedy, 167 U. S. 363.
Bank v. Hock, 89 Pa. St. 324.
Weckler v. Bank, 42 Md. 581.
Logan County Bank v. Townsend, 139 U. S. 67.

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An enumeration of the powers of a corporation is equivalent to a prohibition of the exercise of any others.

Pearce v. Mad. & Ind. R. R. Co., 21 How. 442.
Bank of Augusta v. Earle, 13 Pet. 587.
Perrine v. Ches., etc., Canal Co., 9 How. 184.

Acts, declarations, and representations of directors, in order to bind the corporation, must relate to matters within the scope of its authority, and must be performed or made as a board. Individual directors have no implied or general authority to bind the corporation. 1 Elliott on Railroads, 269, and the authorities there cited; also National Bank v. Drake, 35 Kans. 564.

Even where directors or other officers make false statements and reports, in the name of the corporation, concerning the condition of the business in which the corporation is legitimately engaged—for instance, as to its solvency, or the value of its stock, or the nature of its assets—or if they issue fraudulent stock or bonds, they, and not the corporation, are bound. 1 Elliott on Railroads, 3282, and authorities cited.

In Prescott v. Haughey, 65 Fed. 653, which was a suit against all the directors for making false advertisements, statements, and reports as to the condition of the bank in which they were directors, whereby the Typographical Union was induced to deposit $35,000, the Court said:

> "The fraudulent representations charged in the complaint, if made under color of their office, were made entirely outside of the official duties of the directors. Neither the law nor the obligations of their office made it any part of their duty to utter and publish false and fraudulent advertisements, statements, and reports in regard to the condition of the bank. The tort for which they are sued was committed in their private and personal capacity, because the law does not confer upon said officers power to commit

frauds of the character complained of. These directors have used their official stations to enable them to perpetrate a fraud on the plaintiffs entirely outside of the legitimate scope of their duties." Page 655.

In the case quoted from, as in many other cases reported in the books, the representations made by the officers related to matters in which the bank was directly interested. They related to its legitimate business, and were designed to give it credit in order that it might secure deposits and profitably conduct the affairs for which it was organized; and yet, the Courts hold that the officers have no power to bind it, even in such matters, by false and fraudulent statements. In such cases, the bank is, of course, liable for all deposits received and all credits given it on account of the false statements and representations, but its liability is not created by the false statements and representations. It arises from the fact that deposits were actually made with it, or credit actually given it; and this liability would exist if no fraudulent representations had been made. In the present case, the German National Bank did not receive any money from the appellees, or any of them; and, besides, it is not sued on a contract, but for damages on account of alleged fraud and deceit, alleged to have been committed by two of its officers. The money alleged to have been parted with by the complainants was not paid to it, but to the Louisville Deposit Bank, and became its property. If the German National Bank, afterwards, by fraudulent means, in the course of transactions with the Louisville Deposit Bank, procured an equal sum of money, or even that identical money, from it, the right of action to recover it back belongs to the latter bank, and not to the appellees in their individual capacities. The right of the Louisville Deposit Bank, however, to recover—if it has such a right—is not dependent in any degree upon the fraud alleged to have been perpetrated upon them, but

is based entirely upon the fraud alleged to have been subsequently practiced upon the bank itself. The two alleged frauds are entirely distinct, and are shown by the bill to have been perpetrated upon wholly different parties. The German National Bank is, therefore, not liable to these appellees individually for any money it afterwards secured by fraud from the Louisville Deposit Bank, nor is it liable to the Deposit Bank or its creditors, on account of any fraud alleged to have been committed upon the appellees individually.

If the German National Bank is liable to these parties, it is solely on the ground that the President and Assistant Cashier possessed, by virtue of their offices, a general or implied power to bind it by their false statements concerning a business in which it could not be lawfully engaged. It is not alleged that the bank ever took any corporate action whatever in regard to the representations made to the appellees, or in regard to the organization of the Louisville Deposit Bank, or the election of Schwartz as President of that institution, or that it, in any other manner, conferred, or attempted to confer, special authority upon its President or Assistant Cashier to represent it in these matters. The inference that the bank, in its corporate capacity, made any representations or entered into any conspiracy, is expressly negatived by the averments in the bill. It is alleged that—

> "Said German National Bank, through its said President and said Assistant Cashier, . . . colluded, confederated and conspired together with the fraudulent purpose to organize, etc., etc." (Page 3)

And, again, it is alleged that—

> "The said German National Bank, *through* its *officers* and *directors*, especially through its President and Assistant Cashier, aforesaid . . . did falsely and fraudulently represent to your orators, etc., etc." (Page 4.)

No other officials of the bank are mentioned in the bill. Presumably, the bank had a full board of directors and a full complement of other officials, as required by the law and usage, and yet the Court is asked to charge it with damages to the amount of $240,000, on account of false representations, alleged to have been made by only one of its directors and another subordinate officer, neither of whom had been clothed with general or special authority to act in the matter. It is not necessary to cite authorities or make an argument to show that one or two officers, or even all the officers, do not constitute the corporation. They are simply agents of the corporation. As such agents, they possess certain general or implied powers for the purpose of carrying on the business for which the corporation was created, and their acts and declarations, while engaged in carrying on that business, are binding upon it. Each official possesses these general or implied powers only as to that particular part of the business which has been legally entrusted to him; and, if he undertakes to do an act which belongs to the functions of a different officer, he must show express authority for it, or a subsequent ratification of it. If he acts within the scope of his authority, as already said, he binds the corporation; but, if he acts without any authority, or exceeds the authority delegated to him, he binds himself personally, but does not bind the corporation. If he acts within the scope of his authority, and thus binds his principal, he does not ordinarily bind himself personally. Doubtless, if a principal should instruct his agent to make representations which both he and the agent knew to be false, and the agent should do so, both would be liable to the injured party; but the general rule is that when the principal is liable the agent is not, and, when the agent is liable, the principal is not.

See Story on Agency, Section 261, *et seq.*

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The charge in the bill, that the bank combined and confederated with its President and Assistant Cashier and Schwartz to defraud and injure the complainants, adds nothing whatever to the strength of the case, because it plainly appears that whatever was done in the formation of a conspiracy, was done by the two officials named, without authority from the bank, and concerning a matter in which the Bank could not legally bind itself by contract or otherwise. In short, the officials simply combined with each other to do something which the bank had no power to do.

II.

If the appellees have any cause of action against the German National Bank and its Receiver, their remedy is at law. The appellees were sued for a tort, and the judgment must be for damages. Every act which gives a cause of action for damages, and does not constitute a contract, is a tort.

See Pollock on Torts, page 3.
Addison on Torts, Sec. 1, Sub. 38, page 35.
Cooley on Torts, Chapter I.

In Russell v. Clark, 7 Cranch, 89, the Court said:

> "It is a well-settled rule of law that whenever a matter respects personal chattels, and lies merely in damages, the remedy is at law only, and for these reasons: First, because courts of law are as adequate as courts of equity to grant complete and effective reparation to the party injured; second, because the ascertainment of damages is peculiarly the province of a jury."

See Lacombe v. Forstall, 123 U. S. 562; Buzard v. Houston, 119 U. S. 347; Reynes v. Dumont, 130 U. S. 354; Keburn v. Sunderland, 130 U. S. 505; Brown v. Lake Sup. Iron A., 134 U. S. 530; Lewis v. Cochs, 23 Wall. 466; Oelrichs v. Spain, 18 Wall. 211.

There is not a single element in the case presented by the appellees to justify a court in depriving the appellants of the right to have it tried at law before a jury, or, rather, before juries, because, as we shall show hereafter, there are twelve separate and distinct causes of action set forth in the bill, and an attempt to drag in a great many more. There is no trust or lien, or common fund to be distributed, or community of interest in the claims themselves or in the relief sought, or any other fact or circumstance connected with the case as shown by the bill, which according to any recognized rule, would give a court of equity jurisdiction. It was a simple action to recover damages for fraud and deceit, alleged to have been practiced upon the appellants by parties who stood in no fiduciary relation to them, who gave them no lien, either separately or collectively, and who had no transactions with them, except to induce them to part with their money by false representations, as alleged. It is not an action to rescind a contract or to recover property alleged to have been procured by fraud, but the only relief the Court can possibly give upon the allegations of the bill is a judgment *in personam* for the amount of damages which each one may show he has sustained.

Sometimes, when a court of equity has already obtained jurisdiction of a case on other grounds, it will, in order to avoid a multiplicity of suits about the same matters, go on and do complete justice between the parties, even by granting legal relief; and sometimes a court of equity will take jurisdiction of a bill, to protect the complainant against the annoyance and costs of a multiplicity of suits about the same matters; but we know of no case in which a court of equity has taken jurisdiction of a bill by a complainant upon the ground that it was necessary to protect his adversary against a multiplicity of suits for separate injuries inflicted upon different parties by his own wrongful acts.

See Story's Equity, Sec. 64, K.

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Nor is this a case in which a court of equity can take jurisdiction upon the ground that it involves matters of account. Story's Equity, Sec. 457, and the following sections.

There have been no accounts, mutual or otherwise, between the parties. The appellees state in their bill—

> "That, in equity and good conscience, they are entitled to an accounting from the defendant, German National Bank, Adolph Reutlinger and Albert Reutlinger, to the end that they and each of them should be compelled to account and pay over the funds contributed by your orators and their associates, to the extent, at least, of the benefits unlawfully received by them therefrom, etc., etc."

Now, it is perfectly clear from the bill that if the appellants are liable at all, each one of them is liable for the *whole amount* of the loss sustained by each one of the appellees, and no accounting is necessary, or can be had. The foundation of the action is that the appellees were induced, by the fraudulent representations of the appellants, to pay their money to the Louisville Deposit Bank, and it is wholly immaterial, in such a case, whether the parties sought to be charged, or either of them, afterwards, by improper means or otherwise, procured the money, or any part of it, from the bank. If they fraudulently induced the appellees to part with their money, and they lost it, each one of them is personally liable for the whole amount of the loss, although he may have received no benefit whatever from the transaction. This is not an action to recover back money paid to them, but a suit to recover damages on account of the loss of money paid to another party, by reason of their fraudulent conduct. Moreover, the accounting for which the appellees ask is a proceeding which could take place only after a trial and after a personal judgment for damages had been rendered, because until that time, it can not be known that the defendants owe them any thing. Whether a court of equity has jurisdiction

to conduct such a trial and render such a judgment, is the very question in controversy, and, if it has no such jurisdiction, it follows necessarily, that the accounting, which would be a mere incident to the judgment, can not be had.

The appellees allege that the

> "Affairs and accounts between the said defendants . . . have been and are in a complicated condition, and can not be adequately dealt with in a court of law, etc., etc."

It would seem to be sufficient to say, on this point, that the appellees have no interest whatever in the state of the accounts between the defendants, and that they can not make the condition of those accounts the foundation of an equitable jurisdiction over their suit for damages. Neither their right to relief, nor the character or measure of their relief, depends upon the state of the accounts between the defendants.

There can be no contribution among wrongdoers, and consequently, if the money of the appellees had actually been paid to the appellees, instead of being paid to the Louisville Deposit Bank, and one of them had succeeded in appropriating the whole of it to his own use, all the others would have been liable for the whole damage. The attempt, therefore, to sustain the jurisdiction of a court of equity, in such a case, by asking for an accounting between the defendant, must fail for three reasons:

1. Because the Court had no jurisdiction to hear and determine the cause which constitutes the basis of the prayer for an accounting.

2. Because no accounting can be necessary or proper, as each appellee, if liable at all, is liable for the entire damage; and

3. Because the accounting is not asked to be made between the opposing parties to the suit, but between the appellees alone.

Among the cases cited by the appellees in support of the

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jurisdiction of a court of equity to grant relief to a stockholder, who has become such by reason of false representations, that of Peak v. Gurney, 6 House of Lords Reports, 377, is the only one which seems to require notice. The question of jurisdiction was not made in that case, but it was assumed to exist, although the relief prayed for was denied. That case was quite different from the one at bar. There was no attempt to join several stockholders in one suit, for the purpose of recovering either a joint judgment or several judgments; the action was brought by a single stockholder, who had become such by purchase from the original stockholder, who had been fraudulently deceived; the defendants were officers of the corporation which issued the stock, and it was claimed that the plaintiff was entitled to recover upon the false representations made, when it was issued or allotted to his vendor, to induce him to become a stockholder; and, besides, the claim was, as the Court said, "founded upon the loss the appellant has sustained, *and may sustain*, in consequence of being bound by the contract he has entered into." It was not merely a suit for past damages, but for indemnity against future loss. Such relief could not have been secured in an action at law, and it seems to have been conceded that no action at law could have been maintained, even for past damages, by a plaintiff who acquired his stock from another party under the circumstances disclosed in the case. The suit appears to have been brought upon the theory that, as there was no legal remedy against the executor of the deceased officer, or against his associates, there must be some method by which they could be reached in equity; but the courts held that there was no remedy in such a case, either at law or in equity.

III.

But whether the case is cognizable at law or in equity, there was a fatal misjoinder of causes of action and of parties complainant. It is not claimed that the appellees were induced to make a joint subscription to the capital stock of the Louisville Deposit Bank, or that they paid their subscriptions out of a joint or common fund, or that they have a joint or common interest in any judgment or judgments that may be rendered. On the contrary, it is distinctly alleged that they made separate subscriptions, each one subscribing a specific sum, in his own name and on his own behalf, and the amounts of their several subscriptions are set forth in the bill. If a recovery is had, there must be twelve separate judgments *in personam*, one in favor of each appellee for the amount of damage sustained by him, in which no other one will have any interest whatever; and each one can proceed to collect the amount of his own judgment without regard to what course the others may pursue. Speckert can not be plaintiff in an execution to collect the judgment in favor of Frankel, or *vice versa*. One of the judgment creditors may, by superior diligence, succeed in collecting the whole amount due him, to the total exclusion of all the others, and they would have no claim on him for contribution. In fact, it is impossible to imagine a case in which the interests of parties are more completely severed than they are in this. On this branch of the demurrer the authorities are numerous and uniform. It is an elementary rule of pleading, at common law and in equity, and it is recognized in all the statutory codes, that parties can not unite as plaintiffs in actions for torts, or in actions on contracts, unless they have a joint or common interest in the subject-matter. In 1 Southerland on Damages, pages 208, 209, it is said:

> "Whether actions in tort are joint as to the parties injured, or joint as to the parties liable, depends on very

plain principles. The injury is joint when it at once affects property or interests jointly owned; in other words, there must be a community of interests between the parties injured in that which the injury affects."

The rule is also stated in 17 American and English Encyclopedia of Law, pages 600, 601, as follows:

"When their injuries are separate, two or more may not join as plaintiffs in an action of tort, though the injuries are occasioned by the same act."

And again, as to actions on contracts, it is said:

"Parties having rights of action arising out of several contracts with the same obligor, or several rights of action against the same obligor arising out of the same contract, may not join as plaintiffs in one action against the obligor." —17 American and English Encyclopedia of Law, page 561.

The text is supported by the citation of numerous authorities; to which we refer the Court.

Foster says:

"No persons can unite as plaintiffs in a bill in equity unless they have a joint or common interest in obtaining the same relief."—Foster's Federal Practice, Section 72.

And he cites Story's Equity Pleading, Section 279, and Calvert on Parties, 105–110.

Again he says:

"Multifariousness consists in the joinder of two or more distinct and unconnected grounds for equitable relief, each of which might be the foundation for a separate bill. This may occur in three ways—by a misjoinder of plaintiffs, by a misjoinder of defendants, and by a misjoinder of grounds for equitable relief held by and against the same parties."—Section 71.

And see Calvert on Parties, Book 1, Chapter VIII.

It would be tedious to cite all the cases in which the rule as laid down by these writers has been recognized and applied by the Courts, and it is unnecessary to do so, for no case can be found in which the correctness of the rule itself is questioned. It may be useful to the Court, however, to refer to a few of them, which may be conveniently consulted. In Cutting et al. v. Gilbert, 5 Blatch., U. S. C. C., 259, six parties united in a bill in equity to enjoin the collection of a tax which it was alleged was about to be illegally assessed and collected, and in deciding the case the Court said:

> "The interest that will allow parties to join in a bill of complaint, or that will enable the Court to dispense with the presence of all the parties, when numerous, except a determinate number, is not only an interest in the question, but one in common in the subject-matter of the suit. . . . In the case before me, the only matter in common among the plaintiffs, or between them and the defendants, is an interest in the question involved, which alone can not lay a foundation for the joinder of parties."

The bill was dismissed for misjoinder of plaintiffs, and also for the reason that the parties had a remedy at law. In Gray et al. v. Rothschild et al., 48 Hun (55 N. Y.), 596, the suit was brought by seven different firms to recover damages, on the ground that the defendants had entered into a conspiracy to defraud them by purchasing goods on credit and then removing and secreting them without making payment, and that this conspiracy had been carried into execution. The Court examined the whole question and reviewed many authorities, and the result was that the bill was dismissed, on the grounds that there was a misjoinder of plaintiffs and a misjoinder of causes of action.

See Yeaton v. Lenox, 8 Pet. 123.

Gaines v. Chew, 2 How. 619.

Woolstein v. Welch, 42 Fed. 566; and 41 Fed. 249; heretofore cited.

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The rule itself is perfectly plain, and difficulty arises only in its application to the particular circumstances of each case; or, in other words, in determining in each case whether the parties uniting in the action have a joint or common interest in the subject-matter or in the relief sought. It is clearly not sufficient that the parties have a common interest in the legal or equitable questions involved in the litigation. They must have a common interest in the money or property involved, or they must at least have a common right to participate in the fruits of the judgment, according to their respective interests, as in the cases of trusts and liens for the benefit of several parties.

In the present case, it seems to us there can be no difficulty in the application of the rule. A fraud is alleged to have been perpetrated upon these appellees by which each one of them is alleged to have been separately injured—one to the amount of $2,500, another to the amount of $1,000, and others in different amounts stated in the bill. No one of them has, or pretends to have, the slightest interest in the claims of the others, or acknowledges the right of any of the others to an interest in his claim. Upon what ground, then, can they maintain their right to unite in one action, either at law or in equity? It certainly can not be maintained upon the ground that they have, and must continue to have, a common interest in the questions involved, even if that were sufficient; because, although a fraud may have been perpetrated upon one, it does not necessarily follow that a fraud was also perpetrated upon any one or all of the others, and it does certainly appear on the face of the bill that they have no common interest in the subject-matter of the action.

But these appellees sued not only for themselves, but attempted to sue also for all the other subscribers to the capital stock of the Louisville Deposit Bank who were induced

to subscribe by the alleged fraudulent representations; that is, they asked the court try a question of alleged fraud and damages between the appellants and numerous other parties, who are not even named in the bill. The Court was called upon to ascertain whether fraudulent representations were made to parties wholly unknown to it, and whether these unknown parties believed such representations and paid money on account of them, and if so, how much they paid and whether their claims have been transferred, or released or satisfied. The circumstances under which one or more persons may sue on behalf of themselves and others are stated in Foster's Federal Practice, Section 49, and it requires no argument to show that the rule does not extend to such cases as the present. See also Railroad Co. v. Orr, 18 Wall. 471.

The claim made by the appellees on the argument of the demurrer in the Circuit Court that the suit was brought on behalf of the Louisville Deposit Bank, for the benefit of all its stockholders, is inconsistent with the specific allegations and general structure of the pleading. The means by which they were induced to subscribe and pay for the stock are set out with great particularity, the alleged false statements and representations being given in detail; and they expressly state that they sue "for themselves and all others of the same class to which they belong," meaning, of course, the class of subscribers who were induced to become such by the alleged fraudulent conduct of the German National Bank and two of its officers. Throughout the entire pleading it plainly appears that they are claiming a recovery for themselves "and others of the same class with them"; and, after setting forth the alleged fraudulent statements, they say that, "relying on the aforesaid representations, and believing them, and each of them, to be true, (they) were induced thereby to subscribe, and did subscribe and pay, for

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stock in said new bank at par." Thus, their cause of action, as clearly stated by themselves, is based upon the alleged fraudulent representations by which they were induced to become subscribers, and is not a claim against the Louisville Deposit Bank, as stockholders in that institution, but a direct claim for damages against the parties who are alleged to have defrauded each one of them individually. This view of the case is conclusively sustained by an examination of those parts of the bill which relate to the alleged spoliation of the funds of the Louisville Deposit Bank by the German National Bank and its two officers and Schwartz. The allegations upon this subject are clearly insufficient to show a cause of action, either at law or in equity, upon the theory that they are suing on behalf of the Louisville Deposit Bank, or claiming through that bank. They are as follows:

> "Your orators state that, immediately after the organization of the Louisville Deposit Bank, as aforesaid, the said German National Bank and Adolph Reutlinger and Albert Reutlinger and Moses Schwartz commenced, and systematically continued, until the making of the said assignment, to unload upon the Louisville Deposit Bank the worthless papers and claims held by the German National Bank against the said Moses Schwartz; and by the connivance and collusion of the said Moses Schwartz with the said German National Bank and the said Adolph and Albert Reutlinger, and without the knowledge and consent of your orators, *the money raised and contributed by your orators* and their associates, as capital stock aforesaid, was fraudulently diverted, spoliated, and used to pay the worthless claims and debts due by the said Schwartz to the said German National Bank and to said Adolph and Albert Reutlinger.
>
> . . . . . .
>
> "Your orators say that the funds *contributed by them* to the capital stock of the Louisville Deposit Bank, in payment of their respective subscriptions as aforesaid, constituted a trust fund which was not liable for any of

the debts or obligations of the said Moses Schwartz to the said German National Bank and to said Adolph and Albert Reutlinger, and was not liable for the subscriptions of the officers of the said German National Bank to the capital stock of the said Louisville Deposit Bank; and, in equity and good conscience, should not and could not have been lawfully used or appropriated by the said German National Bank, Adolph Reutlinger and Albert Reutlinger and Moses Schwartz for any of such purposes.

"Your orators do not know, and can not say with exactness, how much of *their said subscription funds* were so used, spoliated and appropriated by the said German National Bank, Adolph Reutlinger and Albert Reutlinger and Moses Schwartz, but, on information and belief, aver and charge that at least the sum of two hundred thousand dollars of *their said subscriptions* and payments on capital stock were so used and appropriated.

"Yours orators state that, by reason of the fraudulent collusion, conspiracy, combination and machinations, as aforesaid, of the said defendants, German National Bank, Adolph Reutlinger, Albert Reutlinger, and Moses Schwartz, *the funds contributed by them* were spoliated and depleted, and said Louisville Deposit Bank was ruined, and became insolvent, and was compelled to suspend, and on July 25, 1893, made a general assignment of all of its property to the defendant, Germania Safety Vault & Trust Company, for the benefit of its creditors, and that its assets have not paid any thing, and will not pay more than five per cent on the valid claims proven and asserted against it."

These are nothing more than general allegations that the money contributed by the appellees was fraudulently diverted, spoliated, *et cetera*, to pay the worthless paper of Schwartz held by the German National Bank and the Reutlingers. No specific facts are stated upon which issues could be taken. It is not stated how much money was improperly received by the German National Bank, or how much by the two Reutlingers, singly or jointly, or by what means or devices, or on what worthless debts, it was taken from the bank. The epithet "fraudulently," and the words "worthless debts," do not

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constitute a sufficient foundation for a judicial investigation according to any system of pleading recognized by the courts in this country. The facts constituting the fraud, and the facts in regard to the paper, should have been stated, in order that the defendants might have an opportunity to answer them, and that the evidence may be directed to them; and this is especially required in proceedings in equity.

If this is to be treated as a suit to recover in behalf of the Louisville Deposit Bank for money belonging to that corporation and fraudulently procured from it by the appellants, it is clear that all the allegations concerning the means by which the appellees were induced to subscribe are irrelevant; but it is equally clear that if those allegations were stricken out there would not be even the semblance of a cause of action stated in the pleading. All the remaining allegations might be fully answered by a simple denial in general terms that the defendants had fraudulently appropriated any part of the funds of the Louisville Deposit Bank to the payment of worthless debts held by them, or either of them, against Schwartz. We insist, therefore, that according to every rational construction that can be given to the bill, this was a suit by the appellees to recover, each for himself, damages on account of a fraud alleged to have been committed upon them individually, and not a suit to recover for a fraud practiced upon the Louisville Deposit Bank.

We ask that the decree of the Circuit Court of Appeals be reversed, and that of the Circuit Court affirmed in all respects.

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For Appellants.